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Messrs. Douglas, Heron, and Company, Bankers in } Appellants.
Air, - - - - - }

The Honourable John Grant, Esq; One of the Barons } Respondent.
of his Majesty's Court of Exchequer in Scotland, }

The Appellants C A S E.

THE Appellants, through a laudable Motive of promoting the Trade, Manufactures, and Agriculture of *Scotland*, were induced to commence Business as Bankers on the 6th November, 1769, and afterwards carried on the same in Three Branches, viz. at *Edinburgh, Air, and Dumfries*, to a very considerable Extent.

The Appellants were not then aware of the Danger arising from being too liberal in giving Credits; and that when the Operations of a Banking Company are too extended, the Reflux of their Notes may overbalance the Powers of their Capital, and lay them under the Necessity of contracting Debts to answer Emergencies: The Appellants, therefore, soon found themselves laid under the Necessity of drawing largely upon their Correspondents in *London*, and were obliged to purchase Bills at *Edinburgh*, to be remitted to these Correspondents, to enable them to take up their own Acceptances. This Mode of conducting Business was attended with both Expence and Risque; and as from the very Nature of the Thing, the Notes they issued for purchasing Bills were quickly returned upon the Bank, either for Specie or Bills on *London*, their Circulation, instead of being lessened, increased daily, and by the Beginning of the Year 1772, they had contracted a very large Debt in *London*. In this Situation, the Appellants saw the Necessity of diminishing the Credits they had granted in *Scotland*, and of calling in their Funds, in order to enable them to discharge that Debt: But as they could not expect immediate Payment from their Debtors, and as it would require some Time to collect a sufficient Fund for that Purpose, it became necessary to devise some temporary Expedient; and with that View it was agreed upon to employ Two Mercantile Houses in *London* to manage a Circulation, by the Appellants drawing upon these Houses, and remitting them Bills upon Bankers in *London* to answer these Draughts; a Mode of Business which would prevent them from the Necessity of purchasing Bills from a Number of different People, drawn upon a Number of different Houses in *London*, and would likewise lessen the Expence of their Operations to the Extent of at least 3000 *l. per Annum* by Savings on Commission, &c.

Mr. *Alexander Ferguson* of *Craigdarrock*, One of the Directors of the Appellants Company at their *Edinburgh* Branch, being in *London* in Spring 1772, and being well acquainted with the Plan of the Company for relieving themselves from their Embarrassments, had frequent Conversations upon the Subject of the Credits thus proposed to be established with Mr. *John Fordyce* and Mr. *Andrew Grant*, who were Partners in a House in *London*, carried on under the Firm of *Fordyce, Grant, and Company*; and also Partners in a House in *Edinburgh*, carried on under the Firm of *Fordyce, Malcolm, and Company*; and had likewise frequent Conversations upon the same Subject with Mr. *Charles Ferguson*, a Partner in a House in *London*, carried on under the Firm of *Charles Ferguson and Company*; but the said *Alexander Ferguson* addressed himself particularly to the said Mr. *Grant* and Mr. *Charles Ferguson*, as he considered them to be the Managers and acting Partners of their respective Houses in *London*, and as such he negotiated with them the whole Transaction as a Transaction with those Houses.

After various Conversations, the Parties came at last to an Agreement, which was carried into Execution in the following Manner:

Mr. *Grant* sent a Letter under his Hand to Mr. *Alexander Ferguson*, in the following Words: "*London*, 20th April, 1772. Dear Sir, As I cannot have the Pleasure of meeting with you To-day, and understand that you propose leaving *London* early To-morrow Morning, I shall mention to you what I understand to be the Terms agreed upon between us for Messrs. *D. H. and Company*, commencing an Account with my House in *London*, which please to confirm in Reply to this:—First, That *D. H. and Company* shall have Liberty to draw upon my House in *London* for what Sums, and at what Dates they think proper; or order them to pay away Money to any other of their Correspondents.—2dly, That for all Bills drawn, at or under the Rate of Ten Days Date, Messrs. *D. H. and Company* shall, by the same Post, remit Bills on their Bankers, or other Bills on Bankers in *London*, sufficient for Payment of these Bills.—3dly, That for all Bills drawn above the Rate of Ten Days, they shall remit Bills on Bankers as above, to be in the Hands of the House in *London*, at least Ten Days before their Bills become due.—4thly, That they shall give no Orders to pay away any Money sooner than Five Days after the House in *London* shall receive the Order; and the same Post that brings such Order, shall bring Remittances in Bankers Bills for the same.—5thly, *D. H. and Company*, shall constantly keep in the Hands of my House, the Sum of 6000 *l. Sterling*, which, on no Consideration, shall ever be reduced; and for which they are to be allowed no Interest.—6thly, That in Consideration of the above Deposit without Interest, the House shall charge Messrs. *D. H. and Company* no Commission whatsoever, while the Amount of the Sum paid for them, whether by Bills or otherwise, does not exceed the Sum of 450,000 *l.* within the Space of One Year, or Twelve Calendar Months; but they shall pay a Commission after the Rate of 2 *l.* for every 100 *l.* that shall be paid for them above the Sum of 450,000 *l.* within the Space of One Year.—7thly, All Bills they draw shall be charged to their Account at the Dates they become due, without the Days of Grace; and they shall be allowed Interest by the House in *London*, at the Rate of 5 *l. per Cent.* for all the Money they shall have lying in the Hands of the House, over and above the Deposit of 6000 *l.* already mentioned."

To this Letter, on the same Piece of Paper was subjoined, a Letter signed by Mr. *Charles Ferguson*, and addressed to Mr. *Alexander Ferguson*, relative to the Agreement between them, in the following Words: "*London*, 20th April, 1772. Dear Sir, Having perused and considered the Proposals made you by Mr. *Grant*, for carrying on an Account between Messrs. *D. H. and Company*, and his House, I hereby agree to carry on an Account by my House here, to the same Extent, and on the same Conditions."

Upon the same Sheet of Paper Mr. *Alexander Ferguson* wrote an Answer to both the said Letters, addressed to Messrs. *Grant* and *Charles Ferguson*, in the following Words: "*London*, 20th April, 1772. Gentlemen, I am clearly of Opinion the Terms you propose to conduct the above Account upon for Messrs. *D. H. and Company*, are very reasonable, and agree to the same on their Part, which I have no Doubt will meet with their Approbation."

Mr. *Alexander Ferguson* left *London* immediately after these Letters were wrote; and upon his Arrival at *Edinburgh*, made a Report to the Directors of *Douglas, Heron, and Company*, of the Transactions he had entered into; and in this Report shewed the Sense he had all along entertained of the Transactions, viz. That the One in which Mr. *Andrew Grant* had been a Party Contractor, was a Transaction with the House of *Fordyce, Grant, and Company*; and the other, in which Mr. *Charles Ferguson* was a Party Contractor, was a Transaction with the House of *Charles Ferguson and Company*; and the Appellants, considering the Transactions in this Light, on 7th May, 1772, approved of them by a Minute in the following Words: "Mr. *Ferguson* also laid before the Meeting the Agreement which he had made with *Charles Ferguson and Company*, and *Fordyce, Grant, and Company*, for negotiating a Part of the Transactions of this Company at *London*; they

" were

" were approved of, and Mr. *Ferguson* desired to write them so, and let them know that Mr. *Hogg*, the Cashier, had
 " Orders to commence the Operations of the Company upon them in Terms of these Agreements; and it is recommended
 " to Mr. *Ferguson* to mention to those Gentlemen, that it is expected some of their Friends will give Letters of Guarantee
 " for their Transactions with the Company."

In Consequence of this Approbation and Condition therein contained, Mr. *Alexander Ferguson*, the same Day, sent a Letter under his Hand to Mr. *Grant*, in the following Terms: "*Edinburgh*, 7th May, 1772. Dear Sir, I have this Day laid before the Directors of *D. H.* and Company here, the Agreement I entered into with your House upon the 20th ultimo, for the Purpose of negotiating a Part of *D. H.* and Company's Business in *London*, which I have the Pleasure to inform you they have desired me to acquaint you they very much approve of: As we are acting for a Number of other People, and consequently must be more scrupulous in our Transactions than if they were on our own Account, we hope you will not look upon it as in the least Degree disrespectful to your House that we request you, at your Convenience, to transmit us a Letter of Guarantee from One or Two of your Friends, for your Transactions with *D. H.* and Company. Bills, to the Amount of the Deposit to be kept with your House for transacting the Business of *D. H.* and Company, free of Commission, will be transmitted you in the Course of a few Posts, which you will be so good as to discount, and place the Discount to the Debt of *D. H.* and Company. I propose that we should do a good deal of our Business with your House, by getting Bills from your House here upon your House in *London*, for the Purpose of remitting to our Bankers, for which a Receipt will be given to your House here, and Bills remitted to your House in *London* by us, Ten Days before they become due."

It appears from the above Letter of Mr. *Alexander Ferguson*, that the Appellants intended to begin their Operations with *Fordyce, Grant*, and Company, immediately; accordingly, the Day after that Letter was wrote, viz. on the 8th May, 1772, Mr. *Hogg*, the Appellants Cashier at *Edinburgh*, wrote the following Letter to Messrs. *Fordyce, Grant*, and Company: "*Edinburgh*, May 8th, 1772. Gentlemen, In Consequence of our Mr. *Alexander Ferguson*'s Letter to your Mr. *Andrew Grant*, by last Night's Post, I have this Day drawn on you for Account of Messrs. *Douglas, Heron*, and Company; viz. 700 *l.* and 800 *l.* to *David Thompson*, at Seventy Days Date—900 *l.* and 600 *l.* to *James Mayleson*, Seventy-five ditto, 1000 *l.* ditto.—Eighty ditto.—4000 *l.* to your Credit, I am, &c."

That Mr. *Andrew Grant* viewed Matters in the same Light with the Appellants, and considered the Transaction made with him in *London*, as a Transaction made with *Fordyce, Grant*, and Company, is evident, from the whole subsequent Train of Correspondence carried on by him, both with Mr. *Alexander Ferguson*, and the Appellants. The very First Letter which he wrote Mr. *Alexander Ferguson*, and which bears Date the 14th of May, 1772, contains the following Words: "I received your Favours of the 7th and 9th Instant; and by the First I observe that *D. H.* and Company have confirmed the Agreement you made with me for carrying on Part of their Business in *London*, and that they are soon to remit for the stipulated Deposit. I shall send a Letter of Guarantee for that Deposit in a few Days."

This Letter acknowledges the Receipt of a Letter from Mr. *Alexander Ferguson* of the 9th May, and shews that Mr. *Grant*, when he wrote it, must have received the above Letter from Mr. *Hogg* of the 8th May, the Day immediately after the Agreement between Mr. *Alexander Ferguson* and Mr. *Andrew Grant* had been approved of by the Directors of *Douglas, Heron*, and Company.

From the 8th of May downwards, a continued Series of Correspondence took Place between the Appellants and the House of *Fordyce, Grant*, and Company, of which no further Notice need be taken than to inform your Lordships, that Mr. *Hogg*, by his Letter of 22d May, 1772, covering a Remittance of 2800 *l.* says, "this compleats 4000 *l.* of the Deposit; next Week I will remit you the remaining 2000 *l.*;" and that in another Letter, bearing Date 30th May, he says, "this compleats the 6000 *l.* Deposit;" and that these Letters were regularly answered by *Fordyce* and Company, particularly the last of the 30th of May, by a Letter of 4th June, 1772, wrote with Mr. *Andrew Grant*'s own Hand, and signed with the Firm of *Fordyce, Grant*, and Company, in which he expressed himself as follows: "This compleats the Amount of the Deposit in Terms of our Agreement."

The Deposit being thus remitted, it was natural and proper for Mr. *Grant* to complete the whole Preliminaries of the Transaction by transmitting a Letter of Guarantee to the Appellants, which he had promised to do, agreeably to the Requisition of the Appellants in that Behalf in their Minute of 7th May, 1772. Accordingly the Respondent, on said 4th June, 1772, wrote the following Letter of Guarantee, addressed to the said Mr. *Hogg* the Appellants Cashier:—"Sir, As I learn from my Brother that he has entered into an Agreement with *D. H.* and Company, by which 6000 *l.* of their Money is to lie in his Hands, I hereby become Security for him to those Gentlemen for this Sum, and oblige myself that he shall repay it to them according to the Terms of his Agreement."

This Letter was transmitted by Mr. *Andrew Grant* to his Partner, *John Fordyce*, in *Scotland*, by the same Post. The Letter which covered it was not produced in the Course of the Proceedings in the Court below, as it contains several private Matters; but that Part of it which relates to the Letter of Guarantee is in the following Words: "Inclosed is the Baron's Letter of Guarantee to *D. H.* and Company; I send it to you for your Approbation; you can, if you approve, make *K—g* deliver it."

The Name with the Blank in the Middle means Mr. *King*, a Gentleman who, it is believed, had some Concern in the House of *Fordyce, Grant*, and Company, at least generally transacted the Business carried on by that House at *Edinburgh*, under the Firm of *Fordyce, Malcolm*, and Company.

When the above Letter of Guarantee reached *Edinburgh*, Mr. *Fordyce* happened to be in the Country, so that it did not come to his Hands for some Days, and, as the Appellants are informed, not till the 22d June, 1772.

Alexander Fordyce, Banker, stopped Payment and absconded on the 9th of June, 1772, and *Fordyce, Grant*, and Company, being deeply connected with him, were obliged to stop either that Day or the Day after.—The Accounts of these Failures reached *Edinburgh* before the above Letter of Guarantee came into Mr. *Fordyce*'s Hands.—And as in the then Situation of Affairs he judged it improper to do any Thing which might tend to make any Alteration in the Rights or Claims of third Parties; he therefore, instead of sending the Letter of Guarantee to the Appellants, put it into the Hands of *Henry Dundas*, Esq; his Majesty's Solicitor General for *Scotland*, to be delivered up by him to those who should appear to have the best Right to it.

This occasioned Two several Actions to be brought in the Court of Session, the One at the Instance of the Appellants against the Respondent, and *Fordyce, Grant*, and Company, concluding against them jointly and severally for Payment of the said Sum of 6000 *l.* deposited as above, with the Interest thereof; and the other at the Instance of the Respondent against Mr. Solicitor *Dundas*, and in which the Appellants were likewise made Parties, praying an Exhibition of the said Letter of Guarantee, and that the same might be delivered up to be cancelled.

These Actions being conjoined, came before Lord *Auchinleck*, Ordinary, who, before any Pleading on the Merits of the Cause, and before the Parties had stated their mutual Allegations, authorised the Lord Advocate for *Scotland* to take the Declarations of the said Mr. *Alexander Ferguson*, and certain other Persons, relative to the Matters in question between the Parties; and the following Declarations or Depositions were taken before his Lordship, on Interrogatories exhibited by the Respondent for that Purpose, viz.

The said *Alexander Ferguson* in Answer to written Interrogatories put into his Hand by the Respondent, but not shewn to the Appellants or their Agents, declared, "That in the Months of *March* and *April*, One thousand Seven hundred and

" Seventy-



“ Seventy-one, he had frequent Opportunities to see Mr. *John Fordyce* and Mr. *Andrew Grant*, in *London*. That in the Course of several Conversations he had with Mr. *Fordyce* during that Period, he often heard Mr. *Fordyce* say, that he was soon to take his Name out of the Houses of Business he was concerned in, both in *London* and *Edinburgh*. That the Declarant observed to him, that unless Mr. *Grant*'s Credit was well supported, such a Step might distress him, by creating Demands upon the House. Mr. *Fordyce* replied, That he was determined to leave Mr. *Grant* possessed of such Powers as would sufficiently enable him to support the Credit of his House; and as an Instance of the Credit he intended to leave him possessed of, requested as a Favour of the Declarant, that he would introduce him to Messrs. *Kelby* and *Syme*, Merchants in *London*, with whom he intended to establish a Credit to the Amount of 20,000 *l.* Sterling, for Mr. *Andrew Grant*. The Declarant accordingly introduced Mr. *Fordyce* to Mr. *James Syme*, the acting Partner of that House, and was present at their communing and settling a Credit for Mr. *Andrew Grant*, to the Amount of 20,000 *l.* Sterling, and which he understood was to be guaranteed to the amount of 10,000 *l.* Sterling, by Mr. *Fordyce*, and 10,000 *l.* Sterling, by Mr. *Baron Grant*. That Mr. *Fordyce* also requested the Declarant to introduce him to Messrs. *Mayne* and *Needham*, Bankers in *Fermyn-street*, *London*, with whom he also intended to establish a Credit to the Amount of 12 or 15,000 *l.* Sterling for Mr. *Andrew Grant*: That he accordingly introduced Mr. *Fordyce* and Mr. *Grant* to these Gentlemen, and has since been informed, that a Credit to the Amount of 12 or 15,000 *l.* Sterling was established with them for Mr. *Grant*, and guaranteed by Bond granted for that Purpose by Mr. *Fordyce*: That in *March* and *April*, 1772, the Declarant was employed to establish Accounts in *London*, for the late Banking Company of *Douglas, Heron, and Company*, and had many Conversations on that Subject with Mr. *John Fordyce*, Mr. *Andrew Grant*, and Mr. *Charles Ferguson*, Merchants in *London*; and after many Communings, particularly with the Two last mentioned Gentlemen, he entered into an Agreement with Mr. *Andrew Grant* for a Part of the Business of *Douglas, Heron, and Company*, to be conducted by his House, and with Mr. *Charles Ferguson*, for another Part of it to be conducted by his House.—That the Terms of these Agreements were precisely the same, but were not to be binding upon *Douglas, Heron, and Company*, unless they were approved of by the Directors of that Company, upon the Declarant's reporting them to them when he went to *Scotland*; and the Declarant thinks that the Copy of these Agreements now shewn to him is a just one: That a few Days after the Dates of these Agreements, the Declarant came to *Edinburgh*, and upon reporting them to the Directors of *Douglas, Heron, and Company*, they met with their Approbation; and that the Declarant was appointed to notify this to Mr. *Andrew Grant* and Mr. *Charles Ferguson*, and to desire each of those Gentlemen to send a Letter of Guarantee by One or Two of their Friends for their Operations: That in the Beginning of *May*, 1772, the Declarant wrote each of those Gentlemen to that Purpose, and received a Letter from Mr. *Andrew Grant*, of Date the 14th Day of that Month, at *London*, in which was the following Passage: “I received your Favours of the 7th and 9th Instant, and by the first I observe, that Messrs. *Douglas, Heron, and Company*, have confirmed the Agreement you made with me for carrying on a Part of their Business in *London*, and that they are soon to remit for the stipulated Deposit; I shall send a Letter of Guarantee for that Deposit in a few Days:” And declared, that he did not recollect having ever had any more Correspondence either with Mr. *Grant* or any other Person upon the said Subject.”

The above Declaration was made by Mr. *Ferguson* without the Appellants Agent being present, or required to attend; and the Respondent having afterwards thought it proper to put some new Questions to Mr. *Ferguson*, in Writing, Mr. *Ferguson* subjoined thereto the following Answer:

“ The Declarant thinks that he informed Mr. *Fordyce* soon after he had wrote Mr. *Grant*, as mentioned in his former Declaration, of the Necessity of Mr. *Grant*'s giving some of his Friends as Guarantee for the Transactions of his House with *Douglas, Heron, and Company*; and, so far as he can recollect, thinks Mr. *Fordyce* said, that Mr. *Grant* would have no Difficulty as to that Point, and added, that he himself would be One of them; and the Declarant also thinks, that he mentioned what had passed between him and Mr. *Fordyce* at a Meeting of the Directors of *Douglas, Heron, and Company*, but does not recollect whether they were satisfied with it or not.”

John Busby, One of the Partners of *Douglas, Heron, and Company*, was likewise examined in Absence of the Appellants Agent, and declared, “ That in the End of *April* or Beginning of *May*, 1772, Mr. *Alexander Ferguson* informed him of the Conversation mentioned in his said Declaration; and declared further, that he, as One of the Directors of the said Banking Company, was present at a Meeting of Directors at *Edinburgh* in *May*, 1772, when Mr. *Alexander Ferguson* reported to them the Transaction he had made with Mr. *Grant*, and of the Deposit the Company were to make of 6000 *l.* Sterling free of Interest, for the Trouble of the Account to be kept in virtue of the said Transaction; at which Time, some of the Directors present having enquired what Security the Bank were to have for the said 6000 *l.* Sterling, Mr. *Ferguson* did inform the Meeting, that Mr. *Fordyce* and Mr. *Baron Grant* were to be bound for the same, with which the Meeting was satisfied, as the Declarant understood: And further declared, that it was understood at that Meeting, that such Security was to be lodged before the Money was remitted to Mr. *Grant* at *London*, and that several Enquiries had been afterwards made both by Partners and Directors of the Bank, by whose Authority the Remittances of the 6000 *l.* Sterling was made before the Securities were lodged and Reflections made on that Account.”

John Fordyce, Esq; Receiver General, declared, “ That soon after his stopping Payment, *Isaac Grant*, Agent for Mr. *Baron Grant*, called upon him, and enquired whether the Declarant knew if a Letter of Security from Mr. *Baron Grant* to *Douglas, Heron, and Company*, was delivered; to which the Declarant answered, that he knew nothing of the Matter; and declared, that at that Time he did not well understand what *Isaac Grant* enquired after, as he had not received the Letter in question: Declared, he received the Letter in question under the Cover of another Letter from Mr. *Andrew Grant*, Brother to the Baron, dated at *London*, and importing, that he, the Declarant, might deliver the Letter of Security, inclosed to *Douglas, Heron, and Company*, if he thought proper; and declared, that, after considering what ought to be the Rule of his Conduct in a Matter of that Sort, he judged it most proper to deposit the Letter with a Friend, that by no Act of his he might injure the Rights or Interest of any Person or Party which might depend upon that Letter, and might at the same Time avoid an Appearance of any Intention to conceal the Letter; and that he accordingly deposited the said Letter of Security with Mr. *Dundas*, Solicitor General, in whose Custody he believed it then was: And declared, that he imagined he had Mr. *Andrew Grant*'s Letter, which covered the Letter of Security, and would produce it in Process if he could find it; and that being interrogated by Mr. *Orr*, on the Part of *Douglas, Heron, and Company*, Whether, when *Isaac Grant* first applied to him for the Letter, he knew any Thing of the Cause of granting such a Letter as was enquired after? declared, that, being in *London* in Spring 1772, he was present in the *Globe Tavern* with Mr. *Andrew Grant*, and Mr. *Alexander Ferguson*, then one of the Directors of *Douglas, Heron, and Company*, when they treated about and settled the Terms of an Account to be kept by Mr. *Andrew Grant* in *London* for the said Company, as their Correspondent in transacting Business in *London*, and which Agreement was then wrote and signed; that in a Conversation he had with Mr. *Ferguson* about that Time, he remembered Mr. *Ferguson* said to him, when talking upon the Subject of *Andrew Grant* being the Correspondent of *Douglas, Heron, and Company*, that it would be necessary Mr. *Grant* should give some Security to *Douglas, Heron, and Company*, for the Sum to be deposited by the Agreement; to which the Declarant answered, That he was persuaded that he would find no Difficulty, and offered himself to become one of his Securities, having mentioned formerly to Mr. *Ferguson*, and it being known and understood by him, that he, the Declarant, was to go out of the House: And declared, that the above Conversation with Mr. *Ferguson*, and the Probability of Mr. *Grant*'s having obtained from the Baron, his Brother, a Security for him in that Business, made the Declarant imagine that the Letter enquired after by *Isaac Grant* was a Letter of Security concerning that Business.”

Isaac Grant, the Respondent's Agent, deposed, “ That in *June*, 1772, soon after Mr. *Fordyce* of *Ayrton*'s stopping Payment, he had a Conversation with Mr. *Baron Grant*, then in *Edinburgh*, about the Situation of his own Affairs: That in the Course of that Conversation the Baron informed him of his having given to his Brother a Letter, addressed to *Douglas, Heron, and Company*, importing a Security for a large Sum of Money that was deposited by *Douglas, Heron, and Company*, with the Baron's Brother, *Andrew Grant*, who, by an Agreement, was to become a Correspondent of that Company in *London*, after the Dissolution of his Copartnership with Mr. *Fordyce*. Declared, That in his further Conversation with the Baron on the Subject, it was agreed that the Deponent should go to Mr. *Fordyce*, to whom the Letter might probably be sent, and demand it from him; and it was further a Matter of Consideration, in what judicial Manner “ it

" it ought to be demanded, in case Mr. Fordyce had the Letter and refused to deliver it; but it was thought that any judicial Proceeding at that Period would be improper: That, in pursuance of the Instructions received, the Deponent went to Mr. Fordyce in order to demand the Letter; but upon Enquiry at Mr. Fordyce if he had received such a Letter; he seemed not to understand what the Letter was; but after some Conversation and Explanation of the Matter, he told the Deponent he had received no such Letter, and which prevented the Deponent from making any Demand of Delivery. And deposed, That, at the Distance of some Days, he called on Mr. Fordyce, or rather, as he thinks, having Occasion to be with him upon other Business, in the Course of Conversation the Letter came to be spoke of, that Mr. Fordyce then informed him that he had received it, and said, that he had sent the Letter to Mr. Dundas, Solicitor General, to be kept by him; and asked the Deponent, if he did not think that he had acted properly in doing so, in the then Situation of his Affairs; to which the Deponent answered, That, as Mr. Dundas was a Gentleman of Honour, and that he, the Deponent, understood the Deposition of the Letter to be with him the same Thing as Mr. Fordyce had kept it in his own Custody, he could not but approve of his Conduct."

26th Jan. 1774.
Interlocutor of
the Lord Ordinary.

Memorials were afterwards given in by the Parties, whereupon the Lord Ordinary, on the 26th January last, pronounced the following Interlocutor: " The Lord Ordinary, having considered the mutual Memorials in respect the Parties express a Desire to have the Question between them determined in the speediest Manner, makes *Avifandum* to the Lords; and as the Memorials are very full and accurate, so that the Cause might well be determined upon them, or if any Additions were to be made, they would be very soon completed, appoints the Memorials or Informations to be put into the Lords Boxes within a Fortnight from this Date."

The Respondent in his Information maintained, That he was discharged from the Obligation of the above-mentioned Letter of Guarantee upon two Grounds; 1st, That the Letter had no Relation to any Transaction with Fordyce, Grant, and Company, or to any Sum of Money deposited with that House, but to a Transaction with Mr. Andrew Grant alone, who was to carry on Business by himself upon the Dissolution of the Copartnership of Fordyce, Grant, and Company, which was in Contemplation when that Letter was wrote. And 2^{dly}, That the Letter was never delivered to the Appellants, and therefore could not be the Foundation of any Action at their Instance.

With respect to the first of these Defences, the Respondent concluded from the above Declarations of Mr. Alexander Ferguson, Mr. Fordyce, and Mr. Busby, that the Dissolution of the Partnership of Messrs. Fordyce, Grant, and Company, had been a Measure fixed upon previously to the above Transaction: That this was known to Mr. Alexander Ferguson, who likewise knew, that Mr. Andrew Grant was afterwards to carry on Business by himself, as he had the Year preceding assisted him in procuring Credits with that View, and that he had communicated this to the Appellants.

That in establishing these Credits, Mr. Fordyce was one of Mr. Andrew Grant's Guarantees, which was inconsistent with the Idea that they were established for the Company of Fordyce, Grant, and Company; and that Mr. Andrew Grant entered into the above Agreement in his private Capacity, and not as a Partner of the House of Fordyce, Grant, and Company: That this was confirmed from the Tenor of the Agreement and the Circumstances attending the Execution of it, viz. the Expression in it of My House; Mr. Grant's signing the Letter in his own Name, though in the Presence of Mr. Fordyce; Mr. Alexander Ferguson's Letters being directed to Mr. Grant alone, and referring to him and his House only, and making no Mention of Fordyce, Grant, and Company; Mr. Fordyce being proposed to the Appellants as Mr. Grant's Guarantee, and approved of as such by them, and no Application having been made to Mr. Fordyce, the principal Partner, to get his Friends as Sureties.

That the Respondent's Letter of Guarantee could only apply to a Transaction as between the Appellants and his Brother alone; especially as that Letter was confined to his Brother personally, and to an Agreement which he had learned from his Brother he had entered into with the Appellants on his own Account, but which he had never seen.

That the Respondent could not have thought of engaging for his Brother for any Transaction before his Separation from Fordyce, Grant, and Company, as he knew he could not carry on Business for himself before such Separation.

That the Demand of a Guarantee on account of a Company so long established would have discovered so much Diffidence of their Situation as to render it imprudent for any Man to have engaged as Surety for them; but that the Demand of a Guarantee for Mr. Andrew Grant alone, as setting out on Business, implied nothing to his Disadvantage: That the Respondent thought it his Duty to assist his Brother when setting out in the World on his own Bottom, and apprehended no Danger from a Business under his sole Direction and Conduct, and for his sole Benefit: That his Intention being clearly expressed, the Law would interpret his Obligation accordingly; and that no Interpretation could make it apply to Fordyce, Grant, and Company, nor could the Respondent, consistently with any Principle of Law or Justice, be made liable for the Sum for which the Action was brought: That cautionary Obligations were *stricti juris* at all Times receiving a strict Interpretation, and could not be extended against the Cautioner beyond what the Words naturally and necessarily imported, but ought to be taken in a Sense most advantageous for him, and most agreeable to his Intentions.

It was further maintained on the Part of the Respondent, That the Money in question was not advanced upon the Faith of his Letter of Guarantee, but was remitted to Fordyce, Grant, and Company, before such Letter existed; and therefore it was more reasonable that the Loss should fall on the Appellants, as having made the Remittance on the Faith of Fordyce, Grant, and Company alone, than upon the Respondent, as being a Sum not advanced upon his Credit, and for which he never meant or intended to become Surety.

That Mr. Ferguson could never report any other Agreement to the Appellants than as above, which the Respondent contended was made with Mr. Grant alone; and that the Respondent could not be affected by any Entry in the Appellants Books, or Representation of Mr. Alexander Ferguson, to the contrary.

That although Remittances were actually made to Fordyce, Grant, and Company, yet the Fact appeared to be, that after establishing an Account with Mr. Andrew Grant, for which he was to give a Guarantee, the Appellants found themselves obliged, in order to support their own Credit, to open a like Account with Fordyce, Grant, and Company, as Mr. Grant was not at Liberty to carry on any Business with them at that Time.—That this was to be a Current Account, and was to be carried on with them by drawing Bills, and making Remittances, to any Extent: That it seemed to be intended that on the Dissolution of the Partnership of Fordyce, Grant, and Company, this Account should be transferred to Mr. Grant in the State it then should be; and that he was to carry it on as he found it at that Time, and receive the Deposit advanced to Fordyce, Grant, and Company, and answer all the Bills granted by them before the Account came into his Person: That in this View it became Mr. Grant's Interest, and it might not appear improper to him, to lodge the above Guarantee with the Appellants before the Dissolution of the said Partnership, not as a Security for the Money that had been remitted to Fordyce, Grant, and Company, but that there might be no Interruption in their Operations when that Event should happen, and the Deposit might be immediately transferred by Mr. Andrew Grant, and the Account continued accordingly: That in Contemplation of this, the Respondent's Letter was transmitted by Mr. Andrew Grant to Mr. Fordyce, and it was not surprising that the Appellants remitted the intended Deposit to Fordyce, Grant, and Company, without any Guarantee, as being an old established House with whom they had formerly had Operations to a much larger Amount, without any other Security than their own; and that there was nothing extraordinary in the Appellants requiring Guarantee from Mr. Andrew Grant, when setting up upon his own Bottom; but that, if the Demand of Guarantee respected their intended Transactions with the Company of Fordyce, Grant, and Company, it was a clear Inconsistency of Conduct in the Appellants to have remitted the whole Deposit without having received any Security.

As to the Second Head of Defence, the Respondent insisted, that admitting the Obligation in Question to have been intended by him as a Guarantee for Fordyce, Grant, and Company, yet that it was never a delivered Evident to the Appellants, without which it could never become an effectual Obligation in their Favour.

That

That the Respondent was under no Obligation to guarantee any of the Transactions which either his Brother, or *Fordyce, Grant, and Company*, might have had with the Appellants: That the Guarantee entered into was a mere voluntary gratuitous Act, and without any previous Correspondence between the Respondent and the Appellants, or any Person on their Behalf; the Respondent was not bound to grant any Letter of Guarantee, and after granting it, might refuse to deliver it; and the putting it into the Hands of Mr. *Andrew Grant*, could not be held as a Delivery to the Appellants. Mr. *Andrew Grant* was the Debtor in the Obligation he is supposed to have come under to the Appellants, to guarantee the Transactions in question; and a Writing being in the Hands of the Debtor in the Obligation, could never be equivalent to its being in the Hands of the Creditor.

That Mr. *Andrew Grant* ought to be considered in this Particular as the Respondent's Procurator or Mandator, with a Power of delivering to the proper Creditor; and therefore that it was in the Respondent's Power to call for his Letter out of Mr. *Grant's* Hands, who in such Case was bound to restore it: That if the Respondent had sent the Letter to the Appellants by any other Way, he had a Right to stop it before it reached them: That it was in the Power of a Mandant *rebus integris* to recall the Mandate; and as nothing followed in Consequence of the Respondent's Letter, there could be no Objection to his taking up his own Obligation before actual Delivery to the Appellants, whether out of the Hands of his Brother, or out of the Hands of any other Person that he might think proper to intrust with the Delivery; that there was no Difference between the Case of the Letter's remaining in the Hands of Mr. *Grant*, or being found in the Hands of Mr. *Fordyce*, his Correspondent and Confident, who was not authorised by the Appellants to receive it on their Account; and who could not be considered as a Depositary for them: That till it was actually delivered to the Appellants by Mr. *Fordyce*, the Respondent's Mandate was still unexecuted, and he was still at Liberty to recall it; and that Mr. *Fordyce* had no Right to make any Scruples as to the Re-delivery, when called upon by Mr. *Isaac Grant*, the Respondent's Agent.

That it appeared from Mr. *Ferguson's* Letter, which desired Mr. *Andrew Grant* with his Conveniency to transmit the Appellants a Letter of Guarantee from One or Two of his Friends, for his Transactions with them, that such Guarantee was not meant for the Sums to be immediately transmitted to *Fordyce, Grant, and Company*, but for the Whole of the Transactions to be afterwards carried on with Mr. *Grant* himself: That no Man acting for a public Company could leave the Guarantee, now pretended to be the Condition of the Advance, entirely to the Discretion of the Debtor after the Advance was made; and that as Mr. *Grant* never promised the Guarantee of the Respondent, or any other particular Person; and as the Respondent never had any other Interchange whatsoever with the Appellants, or any other Person for them, on this Subject, there was no Obligation on Mr. *Andrew Grant* to give the Respondent as his Guarantee, nor any on the Respondent to become such.

That Mr. *Andrew Grant* might have taken Twenty Letters from his Friends to this Purpose, and returned them again before their Delivery, without vesting in the Appellants any Right to such Letters, or any Power to call for them: Besides, Mr. *Ferguson's* requiring a Guarantee for Mr. *Grant's* Transactions, was requiring a Guarantee for 450,000 *l.* which could never make a Contract, nor create an Obligation on Mr. *Andrew Grant*, till it was accepted of, and agreed to, by him; but that he never did: He promised Mr. *Ferguson* and the Appellants a Guarantee, only for the Sum to be deposited with him, which was an entire new Proposal; and that not having been agreed to, no Action could arise against Mr. *Andrew Grant*, the Respondent, or any other Person on it.

That the Respondent had a Right to have demanded his Letter from the Appellants themselves *rebus integris*, supposing it to have been delivered to them; his Engagement for his Brother being voluntary and gratuitous, and in its Nature revocable at Pleasure, before it had produced any Consequences.

That as the Letter of Guarantee was a Surety for 6000 *l.* to be deposited in Mr. *Grant's* Hands by the Appellant; so it was impossible to maintain, that any Person becoming Surety for another in a Transaction, of that Kind, without any Limitation in Point of Time, must remain bound as long as the contracting Parties should choose to deal together; on the contrary, in every such Case the Cautioner is intitled to withdraw his Surety when he pleases.

That the Respondent would of Course have been intitled to insist for his Obligation being returned to him, even though it had actually been delivered to the Appellants, upon making good to them what they had advanced in Consequence of it; and that if he could recall his Guarantee *rebus integris* before any Operations followed in Consequence of it, he was intitled to have it delivered up to him without Payment of any Sum of Money to the Appellants.

That the whole Money in question was remitted several Days before the Appellants Knowledge of the Letter in question, or its Existence, without any Treaty or Stipulations between the Respondent and the Appellants, or any Persons for them, as to guaranteeing the Deposit: That the Appellants made no Advances to Mr. *Andrew Grant* on his own Account: That the Advances made by them to *Fordyce, Grant, and Company*, were not upon the Faith of the Respondent's Letter, which neither existed then, nor had been promised; and that therefore nothing followed in Consequence of it; and he was justly intitled to have it restored to him.

The Appellants, by their Information, insisted, with respect to the first Ground of Defence set up by the Respondent, that he had not pointed out any other Transaction entered into by the Appellants with his Brother, than that which is the Subject of the present Dispute; and that it was clear that the above Agreement was not entered into with Mr. *Andrew Grant* as an Individual, and to take Place only on the Dissolution of the Partnership of *Fordyce, Grant, and Company*; but was entered into with him as a Member, and the acting Partner of that Company, and was to take Place immediately.

That Mr. *Andrew Grant*, in his Letter to Mr. *Ferguson*, of the 20th April, did not give the least Intimation of an intended Dissolution of the said Partnership, or that he was to carry on the Business by himself alone; that, on the contrary, through the Whole of that Letter he talked of his House in London, but never of Himself; and that what he meant by his House, was clearly pointed out by every Circumstance of the Transactions that ensued. Mr. *Ferguson* reported to the Directors of the Appellants, that he had made an Agreement with *Fordyce, Grant, and Company*; and they approved of it, but at the same Time desired a Guarantee. Mr. *Ferguson* immediately communicated this to Mr. *Grant*, by his Letter of 7th May, and the next Day the Appellants Cashier, in Consequence of that Letter, wrote to *Fordyce, Grant, and Company*, and advised them of his having drawn several Bills upon them to a considerable Amount. Mr. *Alexander Ferguson*, in his said Letter of 7th May, talked of an Agreement entered into by him, not with Mr. *Grant* alone, but with his House; and in different Passages mentioned his House in London, and his House in Edinburgh, and of getting Bills from one upon the other. He likewise told him that Bills to the Amount of the Deposit would be remitted in a few Posts. And Mr. *Andrew Grant*, in Answer to this Letter, acknowledged the Receipt of it, and observed that the Appellants were soon to remit the stipulated Deposit, and promised to send a Letter of Guarantee for that Deposit in a few Days. Mr. *Andrew Grant* continued to correspond with the Appellants under the Firm of *Fordyce, Grant, and Company*; and Remittances were made by the Appellants to that Company, to complete the Deposit of 6000 *l.* Mr. *Grant*, by the said Letter of the 4th June, under the Firm of *Fordyce, Grant, and Company*, acknowledged the Deposit to be completed, and the same Day obtained the Respondent's Letter of Guarantee, and sent it by the same Post to his Partner Mr. *Fordyce*, for the Purpose of its being delivered to the Appellants. And all of these Circumstances were totally inconsistent with the Idea of a Transaction between the Appellants and Mr. *Grant* alone. The Appellants also further observed, that it could not be pretended that Mr. *Grant* could carry on Business for himself, while the Partnership of *Fordyce, Grant, and Company*, subsisted, and while he used its Firm; or that that Partnership was dissolved, or any Steps taken for that Purpose, or that the Business his House was to manage for the Appellants was to be delayed till that Event should happen. His Letter to Mr. *Alexander Ferguson* of the 14th May, promising to send the Letter of Guarantee in a few Days, and his immediately accepting the Appellants Draughts, made in Consequence of the Agreement; his receiving the stipulated Deposit; his acknowledging its being completed, and his procuring and sending down the Letter of Guarantee by the same Post; all concurred to shew, beyond a Possibility of Doubt, that it was in the View of all Parties, that the Transaction should forthwith take Place by an immediate Commencement of the Correspondence.

It was observed by the Appellants, that the Respondent's Letter of Guarantee applied in the most direct Manner to the Transaction that really took Place:—That it was wrote the Day on which Mr. *Andrew Grant*, under the Firm of *Fordyce, Grant, and Company*, acknowledged the Deposit of 6000*l.* to be completed: That it mentioned the Respondent's having learned from his Brother, that he had entered into an Agreement with the Appellants, and that it was impossible he could be informed of any other Agreement than that which really took Place, and which was all along known and understood to be an Agreement on the Part of *Fordyce, Grant, and Company*, to do Part of the Appellants Business in *London*, for which the Appellants had remitted to that Company 6000*l.* to lie in their Hands, without Interest: That the Respondent's Letter accordingly points out his having been informed that 6000*l.* had already been deposited; as he mentioned his having learned that that Sum was by the Agreement to lie in his Brother's Hands; and that he thereby became Surety to that Extent, and obliged himself that it should be repaid: But as at that Time there had been no Steps taken towards a Dissolution of the Partnership of *Fordyce, Grant, and Company*, the Respondent could not with any Consistency suppose that the 6000*l.* Deposit to which his Letter referred had been lodged with his Brother in any other Character than as the acting Partner of *Fordyce, Grant, and Company*, for whose Behoof it was remitted; it was therefore impossible that he could screen himself by a critical and forced Construction of his Letter of Guarantee, or contend that the cautionary Obligation thereby created could apply only to 6000*l.* remitted to his Brother as an Individual carrying on Trade by himself, independent of all Concern with the House of *Fordyce, Grant, and Company*, which still existed as before.

The Appellants further insisted, that it was of no Consequence to them whether or no there was ever any serious Design of dissolving the Partnership of *Fordyce, Grant, and Company*, and of Mr. *Andrew Grant*'s setting up for himself, or whether any Credits had been obtained for him with that View; and that though Mr. *Fordyce* might talk of withdrawing himself from the Partnership as soon as he had obtained the Office of Receiver General, yet no effectual Steps were ever taken for carrying that Measure into Execution; nor could the Situation of the Partnership at that Time have admitted of such a Measure: That although Mr. *Alexander Ferguson*, in his Declaration (which was taken *ex parte*, and when, from his particular Situation, he thought it improper for him to say more than to answer the Questions put to him upon the Part of the Respondent) mentioned, that in Spring 1771, when these Credits were obtained for Mr. *Andrew Grant*, Mr. *Fordyce* acquainted him of his Intention to withdraw his Name soon from the Houses of Business he was concerned in at *London* and *Edinburgh*, yet he did not mention any thing of Mr. *Fordyce*'s continuing in that Mind in 1772, when the Transaction in question was entered into; on the contrary, the Appellants had Reason to believe, that if Mr. *Ferguson* had been interrogated upon that Head, he would have declared that he did not understand at the Time of the above Transaction that the Partnership of *Fordyce, Grant, and Company*, was to be dissolved; and that, at any Rate, it was sufficient for the Appellants, that the House of *Fordyce, Grant, and Company*, was subsisting at the Time the Appellants began their Correspondence with it, in Consequence of the Agreement made between Mr. *Alexander Ferguson* on the one Part, and Mr. *Andrew Grant* on the other Part, and continued to subsist after the Deposit of 6000*l.* was made, and the Letter of Guarantee for that Sum was obtained from the Respondent: That the Respondent's Averment of his having granted the Letter of Guarantee, with a View to his Brother only, rested entirely on his own Word, and was incapable of legal Evidence, and the contrary ought to be presumed: That the Respondent did not pretend to have been ignorant, that when he granted the Letter of Guarantee, his Brother still remained the acting Partner of *Fordyce, Grant, and Company*; therefore he must have known that the Money which was deposited with him by the Appellants could come into his Hands in no other Character: That after this he could not be allowed to pretend that he meant only to engage himself as Surety for his Brother, and not for the House of *Fordyce, Grant, and Company*; and that if that had been his Resolution, he ought to have granted no such Letter, till the said Company had been dissolved, and a new Transaction had taken Place, which could apply to his Brother alone. The Appellants also positively denied their having had any Intercourse with the House of *Fordyce, Grant, and Company*, previous to the above Agreement; save that they had sometimes sold Bills upon *London*, to the House of *Fordyce, Malcolm, and Company*, in *Edinburgh*, and bought Bills upon *London*, both from that House and from Mr. *John Fordyce*, as Receiver General; but never had any Correspondence in the way of Business with *Fordyce, Grant, and Company*, or drew any Bills upon them till the 8th May, 1772, the Day after the Agreement made with Mr. *Andrew Grant* was approved of by the Appellants Directors; and that it accordingly appeared from Mr. *Hog*'s Letter of that Date, that the first Draughts by the Appellants upon *Fordyce, Grant, and Company*, were made in Consequence of Mr. *Alexander Ferguson*'s Letter of the preceding Day; and that it was upon the same Foundation that the subsequent Correspondence took Place, the Deposit was made, and the Letter of Guarantee was obtained.

That the Respondent's Hypothesis, that the Appellants, after entering into an Agreement with *A. Grant* alone, to take Place upon the Dissolution of the House in which he was then a Partner, had in the mean Time found it necessary to open an Account Current with that House upon the same Terms, and to remit the same Deposit without any Guarantee, was perfectly absurd, and stood directly contradicted by every Circumstance of the Case. The Agreement between Mr. *A. Ferguson* and Mr. *Grant*, was only confirmed by the Appellants upon the 7th May, and on the very next Day the Appellants Cashier drew upon *Fordyce, Grant, and Company*, expressly in consequence of Mr. *A. Ferguson*'s Letter of the preceding Day, informing Mr. *Grant* of the Confirmation of the Agreement. The Deposit lodged with *Fordyce, Grant, and Company*, was therefore remitted in consequence of that Agreement, to which the Condition of a Letter of Guarantee had been added by the Appellants; and as Mr. *A. Grant* immediately agreed to that Condition, the Letter of Guarantee he obtained from the Respondent could apply to no other Deposit than that which was made, and to no other Transaction but that which really took Place, *viz.* That the Appellants should draw upon *Fordyce, Grant, and Company*, to a certain Extent, upon the Condition of depositing 6000*l.* to lie in their Hands, without Interest; but for which *Fordyce, Grant, and Company* were, on the other Hand, to procure the Guarantee of One or Two of their Friends.—The Appellants further observed, that there was nothing more extraordinary in the Appellants requiring a Guarantee from *Fordyce, Grant, and Company*, than if they had been dealing with Mr. *A. Grant* alone; for though the Appellants had no Doubt of that House at the Time, it was uncertain how long the Account might be continued; and as 6000*l.* of the Appellants' Money was to lie constantly with that House, it was natural to require a Guarantee for the Re-payment of so large a Sum when the Account should come to be closed, and that it was not of any Consequence that the Deposit was completed by the Appellants before the Letter of Guarantee was granted; that Letter was necessary because the 6000*l.* was to lie constantly in the Hands of *Fordyce, Grant, and Company*, but they could not imagine they run any Risk in trusting that Sum for a few Days with a House that was in good Credit at that Time. Indeed they could not well expect the Letter of Guarantee would be sent till the Deposit was actually made, and the Guarantee was accordingly procured on the very Day on which the Deposit was completed, and was sent down by that Night's Post to be delivered to the Appellants.

With respect to the second Head of the Respondent's Defence, the Appellants contended, that the Moment the Letter was signed by the Respondent and put into Mr. *Andrew Grant*'s Hands for the Purpose of being transmitted to them, it ought to be considered as a delivered Evident to all Intents and Purposes: That a Letter of Guarantee was made a Condition of the Approbation of the Agreement by the Appellants; that such Condition was immediately intimated by Mr. *Alexander Ferguson* to Mr. *Andrew Grant*, who acquiesced in it, and promised to send such Letter in a few Days, and that, as upon the Faith thereof, the Sum to be deposited was remitted to Mr. *Grant*, and the Receipt of it was acknowledged by him, he ought to be considered as a Depositary for the Appellants the Moment it was put into his Hands in order to be transmitted to them; and he could not, without being guilty of a gross Fraud, either have destroyed it or kept it up from them; and that, if under such Circumstances, an Action had been brought against him for Exhibition and Delivery of such Letter to the Appellants, a Decree of Exhibition and Delivery would undoubtedly have passed against him; but that the Case was still stronger, as Mr. *Grant* had transmitted it directly to his Partner Mr. *Fordyce*, and desired him, if he approved, to make Mr. *King* (to whose Lot it fell to act in the more inferior Business of the Company) deliver it to the Appellants: That no Argument could be drawn from the Words of Mr. *Grant*'s Letter to Mr. *Fordyce*, desiring him to cause the Letter of Guarantee to be delivered to the Appellants, if he approved, for that Mr. *Fordyce* had it not in his Power to disapprove of it, so far as to deprive the Appellants of the Letter of Guarantee which they had demanded, and which was agreed to be given to them. It was made a Condition that such a Letter of Guarantee should be obtained; and as the House of *Fordyce, Grant, and Company*, were in actual Possession of the Deposit under that Condition, Mr. *Grant*'s Letter could bear no other Meaning than this; That the Letter of Guarantee should be delivered, upon Mr. *Fordyce*'s being of Opinion that it was conceived in proper Terms; and the only Effect Mr. *Fordyce*'s signifying a contrary Opinion could possibly have had, would have been the procuring a more

ample Letter of Guarantee to the Appellants, if Matters had continued upon the Footing they were in when that Letter was wrote; but as that became impracticable, through the subsequent Failure of *Fordyce, Grant, and Company*, and as *Mr. Fordyce* did not consider himself at Liberty to withhold it, and put it into the Hands of *Mr. Dundas*, for the Benefit of those who in the End should be found to have the best Right to it, the Appellants were entitled to demand Exhibition of it, and to a Decree in Consequence of it against the Respondent.

It was further argued by the Appellants, That if the Letter of Guarantee was then in the Hands of *Mr. Fordyce*, he could not have it in his Power to withhold it from them on the Pretext that he did not altogether approve of it. If it had been a Matter optional to him then, to receive the Deposit upon Delivery of this Guarantee or not, he might have said, that he would have nothing to do with the Deposit, and therefore would not deliver the Letter of Guarantee; but having received the Deposit, and become unable to pay it from the Failure of the House, the Letter of Guarantee, by Means of which the Sum would be made effectual from another, ought to be delivered up, and his depositing it with another Person, after the Failure of the House, could not alter the Appellants Right in the smallest Degree. The Appellants therefore prayed to be acquitted from the Action brought by the Respondent, and for a Decree against him, and *Fordyce, Grant, and Company*, in the Action brought by the Appellants.

24th Feb. 1774.
2d Interlocutor
appealed from.

On the 24th February, 1774, the abovementioned mutual Actions came under the Consideration of the Lords of Session, when the Court was pleased to pronounce the following Interlocutor: "On Report of Lord *Auchinleck*, Lord President for the Week, and having advised the Memorials, *hinc inde*, the Lords sustain the Defences for *Mr. Baron Grant*, assolzie him from the Action at the Instance of *Douglas, Heron, and Company* against him, and decern, and remit to the Lord Ordinary to proceed accordingly."

Against the above Interlocutor of the Court, the Appellants preferred a Reclaiming Petition, in which, after recapitulating the Facts and the Substance of their former Argument, they, in Answer to the Argument of the Respondent, further observed, that as the Letter of Guarantee referred to an Agreement already made, only remained to be enquired what Agreement had really been made; and that from the whole Circumstances of the Case, it was plain there was but one Agreement, and that that Agreement was between the Appellants and *Fordyce, Grant, and Company*, and not between them and *Andrew Grant* alone.

That in the Situation in which *Mr. Andrew Grant* then stood, the Transaction at *London* between him and *Mr. Ferguson* could have nothing in View but an Agreement between the Appellants and the House of *Fordyce, Grant, and Company*. *Mr. Grant's* own Letter, from Beginning to End, speaks of a House, an Expression not applicable to a single Merchant, but to a Company; and of a House then actually existing, in which he had a Concern, and the only House in *London* in which he had a Concern, was that of *Fordyce, Grant, and Company*, and consequently the only House to which it could apply.

That it was of no Consequence, that *Mr. Grant* talked of his House, for in speaking of Houses of Trade some Merchants adopted the Singular and some the Plural Number; and some spoke of themselves in the Third Person, which the Appellants were ready to prove, if necessary: That nothing was more common than for a Partner, even though not at the Head of a House, to call it his: That *Mr. Andrew Grant*, though the second Partner named in the Firm, was properly to be considered at the Head of the House of *Fordyce, Grant, and Company*, *Mr. Fordyce* having taken very little active Concern in it after he became Receiver General; and that though the Respondent did not pretend that any Separation of the Partners of the House of *Charles Ferguson* and *Company* was then in Contemplation, yet it was remarkable that *Mr. Alexander Ferguson* treated with *Mr. Charles Ferguson* alone, in the same Manner as he did with *Mr. Andrew Grant*; and that *Mr. Charles Ferguson* in his Letter likewise spoke of his House, although it consisted of several Partners.

That the Evidence attempted by the Respondent to show that it was a private Transaction with *Andrew Grant* alone, was of no Weight: That Evidence consisted of Declarations only, and some of them taken *ex parte* before any Hearing on the Merits of the Cause, or any stating of the mutual Allegations of Parties; and even supposing them to be admissible as Evidence, yet nothing could be drawn from them to counterbalance the real Evidence arising from the Circumstances of the Case.

That the Conversations with *Mr. Fordyce* with regard to his taking his Name out of the Houses he was concerned in in *London* and *Edinburgh*, mentioned by *Mr. Ferguson* in his Declaration, and the Transactions that took place with a View to that Event, passed in the Months of *March* and *April*, 1771; but that the Transaction in question did not take place for a Year after, at which Time the House of *Fordyce, Grant, and Company*, remained as before. That no fixed Period for the Dissolution appeared to have been mentioned by *Mr. Fordyce* to *Mr. Ferguson*; and that though it might seem probable to *Mr. Ferguson* that it might soon take place, yet that Event not happening in the Space of a Year, the Probability of it was greatly lessened; and as it was not mentioned by *Mr. Grant* to *Mr. Ferguson* in the Course of the Transaction, it was impossible that *Mr. Ferguson* could have any such Event in View, or could mean to treat with *Mr. Grant* in any other Capacity than as a Partner of *Fordyce, Grant, and Company*.—That the Agreement with *Mr. Andrew Grant* was meant to be immediately carried into Execution, as the Difficulties the Appellants were under made it necessary to make immediate Use of the Account that was to be opened; and that therefore the Treaty could not be with any other House than that of *Fordyce, Grant, and Company*, then existing: That it would have been absurd to have entered into any such Treaty with a House not formed, and without any Time fixed for forming it, or knowing what Persons were to be the Partners in it; and that it appeared from *Mr. Alexander Ferguson's* Declaration, that he must have had frequent Conferences about the Business with *Mr. John Fordyce, Mr. Andrew Grant, and Mr. Charles Ferguson*, which shewed that he was treating with *Mr. Fordyce* as a Partner of the House of *Fordyce, Grant, and Company*.

That *Mr. Fordyce's* offering to become a Guarantee, even admitting the Fact to be proved, was a Matter of no Consequence to the Respondent's Defence; for that such Offer was no Part of the original Transaction, but was proposed by *Mr. Fordyce* some Time after *Mr. Ferguson* returned to *Scotland*; for *Mr. Ferguson* in his Declaration says, "He thought he informed *Mr. Fordyce* soon after he had wrote to *Mr. Grant*, in pursuance of the Minute of the Directors, of the Necessity of *Mr. Grant's* giving some of his Friends as Guarantee; and, as far as he recollected, thought that *Mr. Fordyce* said, that *Mr. Grant* would have no Difficulty as to that Point, and added, that he himself would be one." That though *Mr. Busby*, in his Declaration, seemed to represent the contrary; and *Mr. Fordyce's* Account of the Matter, though not quite distinct with regard to the Time, appeared to represent the Conversation between him and *Mr. Ferguson* as having happened at *London*; yet the contrary was evident from *Mr. Ferguson's* Declaration, and from Circumstances of real Evidence, more correct than any Thing depending upon the Memory of Witnesses; for that the Condition of procuring a Letter of Guarantee was no Part of the original Agreement, contained in the Letter of the 20th of *April*, but was required by the Directors of the Appellants on *Mr. Ferguson's* Report.—And *Mr. Ferguson*, when he intimated this by Letter to *Mr. Andrew Grant*, made an Apology for it, from which it appeared it had not been mentioned before; that therefore, *Mr. Fordyce's* Offer could have no Effect on the Construction of the original Agreement; and that at any Rate such Offer was not Inconsistent, as many Effects might follow from such an Obligation which could not be attained without it, *viz.* Inhibition and Arrestments against his private Estate, and Executions of all Sorts might follow more readily than if no such Obligation was taken.

That *Mr. Fordyce's* not interfering in the Course of the said Transaction, was no Argument as to its being a Transaction with *Mr. Grant* alone, or for himself, as *Mr. Fordyce*, after he became Receiver General, gave himself little Trouble about the Concerns of the Partnership, but the whole were managed by *Mr. Andrew Grant*, and *Mr. Trotter*, the other Partner, but principally by *Mr. Grant*.

That taking, therefore, the whole Circumstances of the Case together, it was clear, That there was but one Agreement—That that Agreement, in the Meaning and Understanding of both Parties, was an Agreement between the Appellants and

and *Fordyce, Grant, and Company*, and operated upon as such.—That a Deposit, to the Amount of 6000 *l.* was made in the Hands of *Mr. Andrew Grant*, pursuant to the Terms of that Agreement.—That a Letter of Guarantee was stipulated for by the Appellants with respect to that Agreement.—That the Respondent's Letter of Guarantee bore express Reference to an Agreement, and mentioned the 6000 *l.* of Deposit as *already* lodged in the Hands of *Mr. Andrew Grant*, and he thereby obliged himself that it should be repaid.

It was therefore contended, That that Letter was directly applicable to the Agreement in Consequence whereof the Transactions of the Appellants with *Fordyce, Grant, and Company*, ensued, and was obligatory on the Respondent to see the Deposit made by the Appellants in the Course of the above Transactions repaid; for that there being no other Agreement, and no other Deposit in Existence to which it could apply, it necessarily applied to the Deposit which is the Subject of the present Question.

And with respect to the 2d Ground of Defence relied upon by the Respondent, *viz.* That the Letter of Guarantee was never a delivered Evident to the Appellants, and therefore no Foundation of an Action at their Instance;—the Appellants, by their said Reclaiming Petition, insisted, That the Moment that Writing was delivered to *Mr. Andrew Grant* it ought to be considered as delivered to the Appellants, and to be their Evident, which they were intitled to call for, if *Mr. Grant* had refused to deliver it up, and that the same vested in them a Right of Action against the Respondent.

Lord Fountain-
hall, Vol. I.
Page 394.

In support of this Doctrine, the following Case was cited on the Part of the Appellants; Colonel *Borthwick* against *Thomas Lawrie* Merchant in *Edinburgh*—The Lords sustained the Delivery of a Paper, though not to the Party, but to another for his Behoof, though he knew nothing of it, and he could not accept it.

The Appellants insisted, That the above Decision applied to the present Case:—That the Delivery of the Letter of Guarantee by the Respondent to his Brother, *Mr. Andrew Grant*, was clearly a Delivery for their Behoof; for if that had not been the Case—the Respondent would have transmitted the Letter by Post to the Appellants, or have taken it with him and delivered it himself in *Scotland*, as he, according to his own Account, set out for that Country the Day it was wrote or the Day after; so that there was no Occasion for putting it into the Hands of *Mr. Andrew Grant* merely for the Purpose of transmitting it to *Scotland*, or for any other Purpose than as Custodian for Behoof of the Appellants.—That the Circumstances of the Case shewed, that *Mr. Grant*, in receiving Delivery of the said Letter, must have been acting for Behoof of the Appellants, and in no other Character or Capacity;—for that, when the Transaction between *Mr. Andrew Grant* and *Mr. Ferguson* was reported to the Directors of *Douglas, Heron, and Company*, they made a Condition that some of *Mr. Grant's* Friends should become Guarantee to the Company for the Transactions with the House.—That this was immediately made known to *Mr. Andrew Grant*, by a Letter from *Mr. Ferguson*; and *Mr. Grant* immediately accepted the Condition by the following Words in his Letter of the 14th of *May*: “I shall send the Letter of Guarantee for that Deposit in a few Days.”

The Appellants argued that *Mr. Andrew Grant* was bound to transmit them a Letter of Guarantee; and that when such Letter of Guarantee was signed, and put into his Hands, the Appellants had a Right of Action against him, upon his Letter of the 14th of *May*, to compel him to deliver it over to them: That he was not at Liberty to destroy it, cancel it, or return it, without infringing the Obligation he had come under; therefore, that the Moment the Letter was put into his Hands, it ought to be considered as delivered for the Use of the Appellants, it being delivered to a Person against whom the Appellants had a Right of Action, by Virtue of a written Obligation, to deliver the Letter of Guarantee to them: Nor was it of any Consequence to the Question, that *Mr. Grant* had not engaged to procure a Letter of Guarantee from any particular Person; he was bound to procure a Letter of Guarantee, and the Moment he got a Letter of that Nature from the Respondent, with whose Security the Appellants had just Reason to be satisfied, that Letter became their Evident. If, indeed, *Mr. Andrew Grant* had procured a Letter from a Person of doubtful Credit, the Appellants might have demanded additional Security, but still they were intitled to hold the First Letter as their Evident; nor could *Mr. Grant* have deprived them of it, after it was once put into his Hands for their Behoof. It was further argued by the Appellants, that, “*Res non erat integra*,” That the above Deposit having been made by them to *Fordyce, Grant, and Company*, before the Date of the Letter of Guarantee, on the Faith of such a Letter being sent to them, agreeable to *Mr. Andrew Grant's* Promise; and such Remittance having been acknowledged under the Firm of *Fordyce, Grant, and Company*, of even Date with the Letter of Guarantee, all *Locus penitentiae* on the Part of *Mr. Andrew Grant* was excluded.

11th March,
1774. 2d In-
terlocutor ap-
pealed from.

An Answer having been put in by the Respondent to the above Petition of the Appellants, the Lords, on advising thereof, on the 11th *March*, 1774, “Adhered to their Interlocutor of the 24th *February*.”

The Appellants, thinking themselves aggrieved by the above mentioned Interlocutors of the 24th *February* and 11th *March*, 1774, have appealed against the same to your Lordships, and humbly hope that they will be reversed, for the following, among other

R E A S O N S.

- I. The Agreement in Question hath not been proved to be an Agreement entered into by *Mr. Andrew Grant*, for and on the Behalf of himself only; but on the contrary, from its general Import, and from the several Transactions relating to it, it appears to have been an Agreement entered into by *Mr. Andrew Grant*, for himself and others, as Partners of the House of *Fordyce, Grant, and Company*; in which Case, the Justice of the Appellants Claim to a Return of the Deposit under the Letter of Guarantee, hath not been contested by the Respondent.
- II. Considering the Agreement in the Light in which the Respondent hath thought proper to put it, *viz.* as an Agreement entered into by *Mr. Andrew Grant*, for himself only, and in Prospect of the Dissolution of the Partnership of *Fordyce, Grant, and Company*, and of his afterwards carrying on Business for himself, *Mr. Andrew Grant* would have been as much liable to repay the Deposit after it came to his Hands, as if the Agreement had been entered into by him for himself and others, as Partners of the said House, whether the supposed intended Dissolution of that Partnership took Place or not. The Appellants could not have any Concern with that Event; the Deposit must have been returned them at all Events, as the Agreement by which *Mr. Andrew Grant* was bound, could not be satisfied without it. And the Letter of Guarantee being made after the Deposit was lodged in the Hands of *Mr. Andrew Grant*, and with the Knowledge of the Respondent, as appears from the Evidence or Declaration of the said *Isaac Grant*, his own Witness, and from the Letter of Guarantee, likewise referring to the Agreement of *Mr. Andrew Grant*, without any Condition annexed to it in Favour of the Respondent, would necessarily create as extensive an Obligation upon him to repay the Deposit, as that which *Mr. Andrew Grant* was under by his Agreement in this Respect; the Respondent, in fact, warranting the Repayment of a Sum of Money in the Hands of his Brother, which he must know he was at all Events under an Obligation to pay, and not a Sum of Money to be put into the Hands of *Mr. Andrew Grant*, on the Dissolution of the Partnership of *Fordyce, Grant, and Company*, or on any other future Contingency whatsoever.

III. The

III.

The Terms of the Agreement in question, contained in Mr. *Andrew Grant's* Letter of 20th April, 1772, submitted to the Approbation of the Directors of *Douglas, Heron, and Company*, gave the Directors a Power to vary or alter these Terms as they thought proper; and they having required a Letter of Guarantee, which was afterwards acquiesced in by Mr. *Andrew Grant*, it became incorporated with the Terms proposed, as much as if it had been Part of the original Agreement; and the Deposit having been remitted to him, in Consequence of that Agreement, and in Prospect of such Guarantee; the Letter of Guarantee obtained by him from the Respondent his Brother, must be considered as having been obtained and delivered to him for the Use of the Appellants, as a Security for the Deposit which they had actually paid, and which the Respondent knew they had paid to him when he wrote the Letter of Guarantee; and therefore Mr. *Andrew Grant* ought to be considered as a Trustee or Holder of the Letter of Guarantee, for the Benefit of the Appellant; and Mr. *Fordyce* having afterwards delivered it to Mr. *Dundas*, without Prejudice to the Rights of the Persons who should appear to be eventually intitled to it, Mr. *Dundas* became a Holder of it for the Appellants only. It would be absurd that the Respondent, who became bound by it upon the Delivery of it to Mr. *Andrew Grant*, should be intitled to have it returned to him at a Time, and upon an Occasion, in which alone it would be useful to the Appellants; and it would be hard to put a different Construction upon it in favour of the Respondent, who must have considered himself as bound by it at the Time of the Delivery of it to his Brother, and to the Prejudice of the Appellants as a commercial Body, engaged in extensive Concerns for the Benefit of their Country; and who were induced to make the said Deposit upon the Confidence of their immediately obtaining a sufficient Letter of Guarantee for Repayment.

E. THURLOW.
ALEX. WIGHT.

WOLFEHUT 2
THOMAS 2

Messrs. Douglas, Heron, and Com- } Appellants;
pany, Bankers in Air, }

*The Honourable John Grant, Esq;
One of the Barons of his Majesty's
Court of Exchequer in Scotland,* } Respondent;

The Appellants CASE.

To be heard at the Bar of the House of Lords, on
Thursday, the 28th Day of *April*, 1774.